

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS
2
3 IN RE DOWNSTREAM ADDICKS)
4 AND BARKER (TEXAS) FLOOD-) Master Docket No.
5 CONTROL RESERVOIRS,) 17-9002L
6 Plaintiffs,)
7 vs.)
8 UNITED STATES OF AMERICA,)
9 Defendant.)
10 -----)
11
12 Suite 616
13 Howard T. Markey National Courts Building
14 717 Madison Place, N.W.
15 Washington, D.C.
16 Wednesday, February 26, 2020
17 2:50 p.m.
18 Telephonic Status Conference
19
20
21 BEFORE: THE HONORABLE LOREN A. SMITH
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23
24
25 Transcribed by: Elizabeth M. Farrell, CERT

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1 P R O C E E D I N G S

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3 (Proceedings called to order, 2:50 p.m.)

4 LAW CLERK: Hi, this is Matney again. May I
5 please have a roll call for the record?

6 MS. TARDIFF: Yes, good afternoon. Beginning
7 with the United States, this is Kris Tardiff. I have
8 with me Bill Shapiro, Sarah Izfar, and Laura Duncan.

9 MR. NOLEN: For Plaintiffs, this is Rand Nolen,
10 and we're joined by Derek Potts, David Frederick, Jack
11 McGehee, Richard Mithoff. And Mr. Consovoy is not able
12 to be on today.

13 THE COURT: Okay. This is --

14 MR. DENENBERG: And then Todd Denenberg on
15 behalf of the subrogated carriers.

16 THE COURT: And who else do we have?

17 MR. DENENBERG: Todd Denenberg on behalf of the
18 carriers.

19 THE COURT: Okay, the subrogated carriers.

20 The purpose for the conference was just kind of
21 a minor one. I wanted to make sure that we had not left
22 anything to be done. I was remembering that there are 14
23 test cases, and I wasn't 100 percent clear as to whether
24 anything involving any of those cases still required
25 action on the part of the Court.

1 Mr. Nolen?

2 MR. NOLEN: Not to my knowledge, Your Honor.

3 The only thing is is that -- as you may recall, all of
4 the other cases in the litigation were stayed. That was
5 part of the -- part of the prior orders. The new cases
6 that were filed and all cases that were existing that
7 were not test property cases would be stayed.

8 And so our question, based on the ruling, would
9 be that those matters, instead of simply being dismissed
10 based on the ruling, would -- our suggestion and belief
11 is that those cases should all remain stayed and that
12 this order that the Court has entered be reduced to a
13 final judgment so that it's appealable and we can take --

14 THE COURT: Yes.

15 MR. NOLEN: -- (inaudible) of the order.

16 THE COURT: So leave them in a stayed condition
17 prior -- while the appeal is going on?

18 MR. NOLEN: Yes, Your Honor.

19 THE COURT: Okay. That seems like a reasonable
20 thing to do.

21 Ms. Tardiff, do you have any objections?

22 MS. TARDIFF: Well, I think I am reading the
23 procedural history slightly differently. I agree that
24 all the other Downstream claims are -- were stayed by an
25 administrative order. But the procedural history is such

1 that our motion to dismiss, at the time it was filed,
2 applied to all of the Downstream cases, and that was
3 specified in the order. The motion to dismiss was
4 actually filed before the selection of the test
5 properties and then Case Management Order 5, paragraph 11
6 of that order specified that the Government's filing
7 under Rule 12, including any motions to dismiss, will
8 apply equally to any complaint adopting the allegations
9 of the master complaint.

10 So I guess we were reading the Court's opinion
11 and order of last week as involving issues in the motion
12 to dismiss and applying to all of the claims so that we
13 would receive an entry of final judgment, rather than an
14 entry of partial final judgment, just as (inaudible) of
15 the test properties.

16 MR. FREDERICK: This is David Frederick, Your
17 Honor. Can I speak to that?

18 THE COURT: Yes.

19 MR. FREDERICK: I would ask the Government to
20 consider --

21 THE COURT: Sure.

22 MR. FREDERICK: I would ask the Government to
23 consider the efficiency of an appeal that would encompass
24 hundreds and hundreds of potential claimants, each of
25 whom would have their own right to file briefs and

1 otherwise be part of the appellate process, and that from
2 the Government's perspective, it would be much simpler
3 for us to proceed on a court-appointed class and
4 individual lead lawyer basis and have the other cases
5 stayed. Otherwise, the appeal is going to be
6 extraordinarily difficult to manage.

7 THE COURT: Yeah, that does seem like another
8 reasonable suggestion.

9 Ms. Tardiff, do you have any response to that?

10 MS. TARDIFF: Your Honor, I could see that
11 being a complication for the appeal. You know, I think
12 as we read through the procedural orders early in the
13 case, I think we had understood that even if there was an
14 appeal on jurisdictional issues, that the court-appointed
15 counsel would still serve in that role for the appeal.
16 But, you know, I realize there could be a difference of
17 opinion on that.

18 THE COURT: Yeah, yeah, there -- it seems that
19 -- I mean, partly I'm operating somewhat at a
20 disadvantage here since I didn't craft any of those stay
21 orders or any of the structure of the litigation until I
22 took over and then vacated the schedule. So I'm inclined
23 to -- in order to keep the stability of the system
24 working, I don't think there's any problem with if the
25 appeal comes down negative, then dismissing all the

1 cases. On the other hand, if the appeal were positive,
2 then you'd have everything together for whatever
3 proceedings were required.

4 So I will issue what, in effect, is a partial
5 judgment on -- that covers all the parties. But
6 obviously the Circuit isn't particularly concerned with
7 the structure of the litigation; it's concerned with the
8 issue. And so in the appeal, the issue would be
9 presumably considered that those other cases would go
10 with that. So given that, I'll issue the judgment in the
11 cases that were before me, stay all the others pending
12 appellate action.

13 So anything else that we need to do in the
14 case?

15 MR. MITHOFF: Your Honor, this is Richard
16 Mithoff.

17 THE COURT: Yes.

18 MR. MITHOFF: One other matter has been brought
19 to our attention procedurally and that involves the cases
20 that may be filed after this appeal and after this
21 judgment. There was a requirement early on for fact
22 sheets to be filed, accompanying the pleading at a
23 certain point and served following the filing of a
24 pleading. And we were wondering whether or not the
25 requirement for the fact sheets could be abated pending

1 the appeal because that will involve quite a bit of
2 paperwork that may or may not be necessary and it may
3 ease the burden of those filing new cases pending this
4 appeal.

5 THE COURT: Okay. Anyone have any comment on
6 that?

7 MS. TARDIFF: This is Ms. Tardiff. I think
8 that's fine. I think we assume under the prior orders
9 that if there are any new complaints or claims filed that
10 relate back, they would just be connected to the master
11 complaint and stayed.

12 THE COURT: Okay.

13 MS. TARDIFF: And, Your Honor, the only other
14 issue that we have, Plaintiffs had filed the motion to
15 appoint a special master. We had addressed that on one
16 of our last conference calls. But I assume that that
17 will just be denied as moot at this point or does the
18 Court need us to formally file a response to that motion
19 to clean up the --

20 THE COURT: No, I think that seems to me,
21 clearly as a result of the decision, moot.

22 MS. TARDIFF: Okay.

23 THE COURT: So --

24 MS. TARDIFF: Very good. We do not have
25 anything else then, Your Honor.

1 THE COURT: Okay. Anything more from the
2 Plaintiffs?

3 MR. FREDERICK: Your Honor, this is David
4 Frederick again.

5 THE COURT: Yes.

6 MR. FREDERICK: I think for the avoidance of
7 doubt, it would be helpful if the Court would consider
8 appointing or extending the appointment of court-
9 appointed Plaintiffs' counsel for purposes of the appeal
10 just so that there is no doubt about how to understand
11 Judge Braden's previous order.

12 THE COURT: To this question, I mean, I would
13 have thought initially that I wouldn't have authority to
14 appoint counsels. I'm not sure how that worked. If
15 anyone has any immediate thoughts on that? Of what the
16 Court's authority is to appoint counsel to the role -- it
17 isn't the classic appointing counsel where -- you also
18 have the fee issue that the Court provides -- or the
19 criminal justice system provides in criminal cases for
20 appointment of counsel. But, here, we're, I guess,
21 looking for an authority that the people who will be
22 litigating the case will be the ones designated.

23 I think if this is a significant issue -- at
24 the current time, I've got other things that have to be
25 done that don't allow for an extended discussion of that.

1 But if that is significant enough, we can hold another
2 conference to try to deal with that.

3 MR. FREDERICK: I'm not sure that it's
4 necessary to further delay, Your Honor. This is David
5 Frederick. I do think that to the extent that the
6 Government understands the original appointment to
7 include representation of the representative parties for
8 the (inaudible) --

9 THE COURT: Yes.

10 MR. FREDERICK: -- on appeal, I think that
11 would be sufficient for our purposes. I would not like
12 to be in a situation where several years from now, if we
13 were to be successful on appeal, for the Government to
14 claim that under the URA we somehow are not entitled to a
15 reasonable attorney's fee for having successfully
16 represented the property owners in a takings case because
17 we were --

18 THE COURT: Right.

19 MR. FREDERICK: -- (inaudible) what we did on
20 appeal.

21 THE COURT: Why don't we -- we --

22 MR. DENENBERG: Your Honor --

23 THE COURT: Yes?

24 MR. DENENBERG: Your Honor, this is Todd
25 Denenberg on behalf of the subrogated carriers. I think

1 -- I know the Court is on a time schedule, but we are now
2 delving into an issue that there has been significant
3 disagreement on and we certainly wouldn't agree that the
4 group technically represents the subrogated carriers, nor
5 can we agree to that. That's an issue that would have to
6 be dealt with, I think, quite frankly, at a later date
7 and much -- with much greater depth.

8 THE COURT: Okay. I will -- I don't think it
9 was the -- Mr. Frederick was talking about the
10 subrogated carriers. Is that correct? You're here
11 representing the Plaintiffs who were property owners?

12 MR. FREDERICK: Yes, that's correct.

13 THE COURT: Okay. Why don't we -- I do this.
14 Why don't, in the order, when we at least leave the other
15 non-14 cases stayed, indicate that the representation
16 structure will stay the same.

17 MR. FREDERICK: Thank you, Your Honor.

18 THE COURT: I think at least as far as the
19 Court's concerned, that keeps the status quo. And, you
20 know, if there's any -- anyone wants to make a change, we
21 could discuss that later.

22 MS. TARDIFF: And, Your Honor, this is Kris
23 Tardiff.

24 THE COURT: Yes.

25 MS. TARDIFF: I think for the Government it's

1 just, I think, the Plaintiffs' selection of counsel
2 whether it's on a representation basis or otherwise,
3 that's really up to the Plaintiffs and not the Government
4 to speak to.

5 THE COURT: Okay. Okay. We will issue an
6 order probably early next week and then we'll talk to you
7 after the appeal, unless something comes up before that
8 on the representation issue.

9 MS. TARDIFF: Thank you, Your Honor.

10 THE COURT: Thank you all.

11 COUNSEL: Thank you, Your Honor.

12 (Whereupon, at 3:03 p.m., the hearing was
13 adjourned.)

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Downstream Addicks and Barker (Texas) Flood-Control Reservoirs

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2/26/2020

1 CERTIFICATE OF TRANSCRIBER

2

3 I, Elizabeth M. Farrell, court-approved
4 transcriber, certify that the foregoing is a correct
5 transcript from the official electronic sound recording
6 of the proceedings in the above-titled matter.

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10 DATE: 2/27/2020

S/Elizabeth M. Farrell

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ELIZABETH M. FARRELL, CERT

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